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No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1959

LESLIE J. VALLESKEY and GRACE VALLESKEY, *Petitioners*

v.

E. J. NELSON, DISTRICT DIRECTOR OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
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OPINIONS BELOW

The opinion of the District Court (Pet. 15-24) is reported at 168 F. Supp. 636. The opinion of the Court of Appeals (Pet. 11-14) is reported at 271 F. 2d 6.

JURISDICTION

The judgment of the Court of Appeals was entered on October 22, 1959. The petition for a writ of certiorari was filed on December 14, 1959. The jurisdic-

tion of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Taxpayer acquired certain real property pursuant to a deceased client's will authorizing her executor to sell him such property at its 1950 assessed valuation if he desired to purchase it. The question is whether taxpayer acquired the property by bequest, devise or inheritance so as to entitle him to a basis under Section 113(a)(5) of the 1939 Code equal to its fair market value as of the client's death, or whether taxpayer's basis is the cost to him of the property.

STATUTES INVOLVED

The revelant portions of Section 113(a)(5) of the Internal Revenue Code of 1939 and Sections 231.12, 232.01, 232.02, 232.06(1), 232.22(1) and 232.23 of 27 West's Wisconsin Statutes Annotated (1957) are set forth in the Appendix, *infra*, pp. 8-9.

STATEMENT

The taxpayer, who with his wife resides in Manitowoc, Wisconsin, was the attorney for Meta Michelsons for a number of years preceding her death on March 15, 1953. Item 38 of her will provides as follows (R. 1[1]):

> I hereby authorize my executors hereinafter named to sell my home, located at 1026 South 15th Street, Manitowoc, Wisconsin, to Leslie J. Valleskey for the assessed valuation thereof as of 1950, if he desires to purchase the same for that amount.

[1] Record references are to the appendix to the taxpayer's brief in the Court of Appeals.

Taxpayer and the East Wisconsin Trustee Company were appointed as co-executors under the will. After assurance that he would get the Michelson home pursuant to Item 38 of the will, the taxpayer declined to serve as co-executor, although he did act as attorney for the executor throughout the probate proceedings. (R. 2.)

The assessed value of the Michelson property in 1950 was $4,800. It was appraised at $10,250 in the estate, which amount was used in the federal estate and state inheritance tax computations. The property was conveyed to taxpayer on May 27, 1953, on payment of $4,800. On June 1, 1953, taxpayer sold the property for $10,000, the expenses of sale being $40. (R. 1-2.)

A schedule annexed to the Order Determining Inheritance Tax issued by the County Court of Manitowoc County, Wisconsin, dated October 20, 1953, lists the taxpayer as a legatee, standing in the relationship of stranger to the deceased, Meta Michelson, and a bequest to taxpayer in the amount of $5,450. Tax on the bequest was determined to be $620.98. This tax was paid by the East Wisconsin Trustee Company, the executor. (R. 2.)

In computing gain or loss on the resale of the property for federal income tax purposes, the taxpayer used $10,290 as the basis, consisting of the appraised value at the date of his former client's death, plus selling expenses, and he reported a short-term capital loss of $290 in his income tax return for 1953. Thereafter, the Government concluded that the basis should have been $4,840, or the amount the taxpayer paid for the property plus expenses of sale, which would result in a short-term capital gain of $5,160. A deficiency assessment was made in the amount of $2,703.03, which

the taxpayer paid together with interest of $529.25. The taxpayer filed a timely claim for refund which was denied. (R. 2.)

The District Court entered an order and judgment dismissing the taxpayer's suit for refund. (R. 11.) The Court of Appeals affirmed, holding that inasmuch as the real property which the taxpayer sold in 1953 had not been acquired by him "by bequest, devise, or inheritance" within the meaning of Section 113(a)(5) of the Internal Revenue Code of 1939, Appendix, *infra*, p. 8, the taxpayer's basis for determining gain or loss on the resale was the cost to him of such property, plus expenses of sale, and not the value at which the property was appraised in the decedent's estate.

ARGUMENT

The taxpayer contends (Pet. 6-10) that he acquired the real property directly from Meta Michelson as a contingent testamentary gift, and, therefore, that the exception set forth in subsection (5) of Section 113(a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 8)—that if property is acquired by bequest, devise, or inheritance, its basis, for the purpose of determining gain or loss upon its subsequent resale, shall be the fair market value at the time the property is acquired—is applicable. This contention, however, is at variance with the facts of record and has been rejected by the courts below, which have both agreed that there was no gift of any portion of the property itself to the taxpayer under the terms of the will and that the transaction did not fall within the provisions of Section 113(a)(5). (Pet. 14, 21.) As pointed out by the Court of Appeals, Item 38 of the will, which

uses the phrases "to sell" and "to purchase", means only that the taxpayer was accorded the right to purchase the property. The court also noted that under Wisconsin law, 27 West's Wisconsin Statutes Annotated (1957), Section 232.23, the power given the executor under the will is mandatory and that the wording of Item 38 shows that the testatrix intended to bind her executors to sell the property to the taxpayer if he wanted to buy. (Pet. 13, 14.)

The resolution of the issue presented depends upon the construction to be given the particular language of Mrs. Michelson's will and upon the interpretation and application of the pertinent provisions of Wisconsin law. It is obvious, therefore, that the issue is not one of general importance. Moreover, this Court will not ordinarily review a determination of local law made by a court of appeals. *Rajan* v. *Merchants Transfer Co.*, 337 U.S. 530, 534.

The decisions below are not in conflict with *Augustus* v. *Commissioner*, 118 F. 2d 38 (C.A. 6th) as asserted by the taxpayer. (Pet. 6-8.) In the *Augustus* case, the taxpayer acquired a contingent reversionary interest by virtue of her father's will, the mother having a right to consume the property with power to dispose of one-half of what remained by will at her death and the father's will providing that the testator gave, devised, and bequeathed the other half of the trust fund to his legal heirs and assigns forever. The issue there was whether the basis of the securities which the taxpayer acquired from the trust at her mother's death in 1928 (which she sold in 1935 and 1936) was their value in 1928, at the mother's death, or in 1922, when her father died. It was held that Section 113(a)(5) of the 1939 Code applied to contingent as well as vested remain-

ders, and, therefore, that the taxpayer's basis under subsection (5) was the value of the securities in 1922. The instant case is distinguishable inasmuch as the taxpayer did not acquire the property in question by bequest, devise or inheritance, but, rather, by purchase. Subsection 5, therefore, is inapplicable, and, under the general statutory rule, the taxpayer's basis is the cost of the property.

The decisions below are in accord with the rationale of this Court's opinion in *Helvering* v. *San Joaquin Co.*, 297 U.S. 496, which sustained the Commissioner's determination that a lessee first acquired the land there involved on November 3, 1916, upon the exercise of an option to purchase granted in a ten-year lease executed in 1906. This Court held that the basis of the property was the actual amount paid for the land in 1916 and not a larger figure contended for by the lessee on the theory that it had acquired an interest in the land when the lease was executed.

The Third Circuit relied on the *San Joaquin Co.* case, *supra*, in *Mack* v. *Commissioner*, 148 F. 2d 62, certiorari denied, 326 U.S. 719, in which the facts, as the courts below noted, are substantially similar to those in the instant case. (Pet. 13-14, 21-23.) In the *Mack* case, the taxpayer acquired, under his father's will, an option to purchase a limited number of shares of stock from the testamentary trustee at a price equal to one-half of the average market value of the shares at the time of the exercise of the option, and the Third Circuit held that the taxpayer's basis was the actual amount paid the trustee for the shares.

CONCLUSION

The decision below is correct and no conflict of decisions is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January, 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *

* * * * *

(26 U.S.C., 1952 ed., Sec. 113.)

27 Wisconsin Statutes Annotated (1957):

TITLE XX. REAL PROPERTY, AND THE NATURE AND QUALITIES OF ESTATES THEREIN

Chapter 231. Uses and Trusts.

Sec. 231.12 *Devises as powers*

A devise of land to executors or other trustees to be sold or mortgaged, where such trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power and the lands shall descend to the heirs or pass to the devisees of the testator subject to the execution of the power.

Chapter 232. Powers.

Sec. 232.01 *How far abolished*

Powers, except as authorized and provided for in this chapter, are abolished; and the creation

construction and execution of powers shall be governed by the provisions herein contained."

Sec. 232.02. *Definition.*

A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

Sec. 232.06 *Special power.*

A power is special:

(1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated.

* * * * *

Sec. 232.22 *Special powers in trust.*

A special power is in trust:

(1) When the disposition which it authorizes is limited to be made to any particular persons other than the grantee of such power.

* * * * *

Sec. 232.23 *Trust powers imperative.*

Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee the performance of which may be compelled by action for the benefit of the parties interested.

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